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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 791

J. CARTER MILLER,

Petitioner (Intervenor),

vs.

SCOTT CUTHILL,

Respondent (Plaintiff),

ORTMAN-MILLER MACHINE COMPANY,
a Corporation,

Respondent (Defendant).

REPLY BRIEF

of J. Carter Miller, Petitioner, to Briefs of Respondents (Plaintiff and Defendant).

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J. Carter Miller.

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INTRODUCTION.

The briefs of the two respondents, one the plaintiff and the other the defendant,—positions which are traditionally adversary in character—are in such harmonious agreement as to bear out our original thesis that the respondents are acting in collusion in this case.

It is a matter of unusual significance (perhaps unprecedented) that a judgment debtor (respondent-defendant Ortman-Miller Machine Company, a corporation) would appear in this Honorable Court and argue in opposition to relief from a judgment against it. It appears without dispute that the judgment of the District Court, rendered on December 21, 1953, was entered without any defense being offered by the defendant corporation's then attorney, Straley Thorpe. Petitioner-intervenor, J. Carter Miller, as a condition to vacating the judgment under Rule 60(b)*, offered to defend the corporation at his own expense, and guarantee the payment, by surety bond or otherwise, of any judgment in excess of the $4100.00 paid into the Office of the Clerk by the defendant's then attorney, Straley Thorpe, on December 21, 1953, when the judgment was entered.

With nothing to lose and everything to gain through vacating the judgment, the defendant corporation has fought side by side with its purported adversary, plaintiff Scott Cuthill, in the District Court, the Court of Appeals, back to the District Court, then again in the Court of Appeals the second time and now in the Supreme Court.

No explanation, cause, or excuse is offered by Respondent Ortman-Miller Machine Company for this untenable and unconscionable position. In a case involving as serious a question as the perpetration of a fraud on the United States District Court and the Court of Appeals, this unusual circumstance alone emphasizes the necessity for the issuance of a Writ of Certiorari to protect the integrity of the Federal Judiciary.

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*Rule 60(b) provides for relief "on motion and *upon such terms as are just*, et cetera" (Italics ours).

(c)

QUESTIONS PRESENTED FOR REVIEW.

The beneficiary of the judgment sought to be vacated, Respondent (Plaintiff) Scott Cuthill, does not question the accuracy or genuineness of the questions presented for review in the Petition for Certiorari.

I.

(Inherent power of Court of Appeals to investigate fraud on the Court).

Respondent (Defendant) Ortman-Miller Machine Company contends at page 3 of its brief that: "The petitioner's first alleged question for review is not presented by this record because the petitioner has not alleged any acts of fraud practiced upon the Court of Appeals."

To demonstrate the fallacy of this contention requires only an examination of the independent application and petition itself as it appears at pages 11a through 21a of the Appendix printed and attached to the Petition for a Writ of Certiorari. How the initial fraud was continued and perpetrated upon the Court of Appeals is specifically alleged in rhetorical paragraphs (8), (9), and (10) of the independent petition and application. (Appendix, pages 18a and 19a). The order denying leave to file the application appears at page 30a of the petition for certiorari.

What the brief of Respondent Ortman-Miller Machine Company fails to take cognizance of is that the perpetration of a fraud on a Court, unlike other frauds, is a continuing thing. Although initially perpetrated on the Dis-

trict Court, it necessarily continued on appeal to the Court of Appeals.

As well stated by this Court in the case of *Hazel-Atlas Glass* v. *Hartford Empire Co.*, (1944) 322 U.S. 38, 64 S. Ct. 997 at p. 1001, in describing the use of a fictitious document (patent opinion) in procuring a favorable decision in the District Court and an affirmance in the Court of Appeals:

"From there, the trail of fraud continued without break, through the District Court and up to the Circuit Court of Appeals."

II.

(Need for exercise of supervisory power in the present case)

Respondent Ortman-Miller concedes that the question of need for supervisory intervention in the instant case "Might be said to be present" (brief, page 4) but reserves its argument on the question. Petitioner, likewise, will reserve his response.

III.

(Contravention of precedent through denial of right of intervention:

Price v. Gurney et al (1945) 324 U.S. 100, 105, 65 S. Ct. 513, 516).

Respondent Ortman-Miller erroneously asserts that this question is not presented by the record because the record shows "the petitioner was allowed to intervene". Only two items of the record need be examined to refute this contention: the opinion and decision of the District Court rendered on August 29, 1955 and reprinted at page 5 of Intervenor-Appellant Miller's Appendix filed in the United

States Court of Appeals and refiled as part of the record in this Honorable Court, pursuant to Rule 21(4), and the opinion and decision of the Court of Appeals appearing at page 1a of the Appendix attached to the Petition for a Writ of Certiorari.

The only way that a person, affected by pending litigation, who has neither brought suit nor been sued can become a party to the litigation is through **an order of Court** granting his application for leave to become a party and making him a party to the litigation. In the instant case, **no order was entered making your petitioner a party,** but his application for leave to intervene was denied in toto on August 29, 1955. (See opinion of District Court, supra, page 16). This order was affirmed by the Court of Appeals on October 16, 1957.

(e)

CONCISE STATEMENT OF THE CASE.

Both respondents, Cuthill and Ortman-Miller, claim that the "Concise Statement of the Case" presented in the Petition for Writ of Certiorari is incomplete and inaccurate. Without pointing out any single fact, they use their conclusions as an excuse for setting out modified, self-serving variations.

This isn't a simple $4,100.00 overtime wage case, as the recitals of the Respondents would make it appear. The underlying issue, which makes this case of primary importance, is whether or not the Federal Court can be used as a tool or conduit for paying off a key witness in pending litigation in the state court. The desire of the respondent corporation to accomplish this misuse of the Federal Court is the sole reason for the unusual, unprecedented position (arguing in favor of judgment against it) in this Court.

Respondent Ortman-Miller asserts that the petitioner's statement "is made up of his unsupported allegations of fraud, which he was totally unable to support before the District Court" (Brief, page 4).

Yet the Supreme Court of Indiana, a five-man court composed of experienced jurists, had this to say about the same exhibits and admissions against interest introduced in the District Court and constituting a part of the record on appeal in the Court of Appeals about the destruction and appropriation of petitioner's business under the guidance of attorney Straley Thorpe (and Clarence Harney) who admittedly failed to defend his client on December 21, 1953, when the Cuthill case came up for hearing in the United States District Court.

"All of these appellees knew they were dealing with 'Midwest' as a distributor.

Harold Ortman knew 'that J. Carter Miller was Midwest Supply Company in 1949,' and the other director-stockholder appellees 'knew,' 'understood', or had 'intimations' that appellant was Midwest Supply Company, or was connected with it. Also, on the subject of knowledge, all the invoices, totalling approximately 7,500 in number from the 'Corporation' to 'Midwest' and processed over a period of several years, clearly disclosed the 30 per cent financial arrangements between the 'Corporation' and 'Midwest'. These were available to all the appellees who were officers and/or directors of the 'Corporation'. Also, they could have received full knowledge of the transaction from appellee Thorpe, who was attorney for the 'Corporation'.

Regarding the benefits which appellees received from the distributorship contract over a long period of time, the evidence is undisputed that approximately 60 per cent of the 'Corporation's' total business was secured through 'Midwest'; that largely through his sales organization the 'Corporation' was able to take an unpatented product and with it develop a business from a $5,000.00 corporation in 1945, without an established market, to an enterprise which in 1952 enjoyed a gross annual sales of approximately $650,000.00. That appellees know of this phenomenal growth and shared in its profits. These profits were shared by appellees in the form of salaries and bonuses which had been increased from $4,800.00 in 1946, to $12,000.00 in 1951. These profits also consisted of the increased value of their shares in the 'Corporation'. At the time of this action the 'Corporation' had a book value of approximately $250,000.00 and a fair cash market value of $500,000.00 to $600,000.00 of which appellees Carl Speichert, Alva Ortman, Harold Ortman and Nelson Ortman each had a one-fifth interest."

(Appendix, pages 90 & 91)

The Supreme Court of Indiana also made these statements about the same documentary evidence and admissions introduced in this case in the five-day hearing in the United States District Court

> "Also, for the purpose of determining the theory upon which the trial court decided the action, we next consider (1) the facts found, and (2) the facts supported by substantial evidence but not found, as they relate to the alleged unlawful acts of the conspiracy committed by appellees. The first of these alleged unlawful acts was the 'Corporation's' refusal to fill orders from 'Midwest' *already accepted* by the 'Corporation'. The court's findings of fact are wholly silent as to this very material fact which is supported by the undisputed evidence and admitted by appellees.
>
> We next consider the court's findings of fact regarding the alleged acts of appellees, designed to destroy appellant's separate business. Upon this issue the evidence is undisputed that appellees, as heretofore stated, sent telegrams and letters to all of 'Midwest's' dealers and sales representatives, notifying them of their cancellation of 'Midwest's' contract and instructing them to *reorder directly with the 'Corporation.'* This necessitated the breach of their respective contracts with 'Midwest'.
>
> Also the evidence is uncontradicted that appellees Alva Ortman and Thorpe personally called upon at least one of 'Midwest's' distributors, a Mr. Gilmore in Detroit, and, in connection with their conversation with him for the purpose of persuading him to break his contract with 'Midwest' and deal directly with the 'Corporation', stated that there was a possibility that J. Carter Miller would be put in jail 'because of the way that business has been conducted.' Such representation constituted an actionable wrong, unless justified by other facts appearing in the record.
>
> Furthermore, the evidence is uncontradicted that the 'Corporation' in a separate proceedings in attachment tied up appellant's entire bank account which

resulted in the 'complete strangulation' of appellant's separate business with regard to this and all other products. These acts on the part of appellees, according to all the evidence, were effective in destroying 'Midwest's' business as a distributor. They were pertinent to one of the most essential issues under the theory of appellant's complaint, yet the court made no finding regarding them.

Finally we consider the issue as to appellee's alleged wrongful appropriation of 'Midwest's' dealers and representatives and the profits of appellant's business. The uncontradicted fact is that appellees were successful in accomplishing this appropriation as it related to the products of the 'Corporation'. Yet, here again, the court failed to find the facts upon this material issue in the proceedings. Failure of the court to find these facts and state conclusions of law material to the theory of the case was error and the error was reversible, unless other facts found are such as to preclude recovery by appellant, notwithstanding the error." (Appendix, pages 80 & 81)

The late Judge Walter Lindley, who wrote the Court of Appeals opinion in the first appeal, had no difficulty analyzing the amended petition for leave to intervene and the conspiracy:

"On January 30 he filed his amended petition for leave to intervene. He averred that he owned 20% of the corporate capital stock; that he had served as president from 1945 until March 1952; that, early in 1952, his corporate associates and their attorney fraudulently attempted to force him out of the business and to deprive him of his investment. Though the averments were in great detail, no good purpose would be served by repeating them here. Suffice it to say, appellant, upon particularized averments, charged that the parties named had deliberately planned to defraud him, the company and the court; that the company's officials and its counsel well knew that the

corporation owed Cuthill nothing and wrongfully failed to resist his suit; that Cuthill knew that the company owed him nothing; that the company deliberately concealed its valid defense from the trial court; that, as a result of the charged collusion, a fraudulent judgment was entered and $4100.00 of the corporate funds placed in the hands of the court to satisfy it and unless relief could be had, would be wrongfully diverted by satisfaction of the fraudulent judgment; and that counsel for the corporation had deliberately failed to act for and in the corporate interest. He prayed that upon his intervention, the court, upon hearing, set aside the judgment and permit proper defense to be made to Cuthill's alleged fraudulent claim. April 15, 1954, the court denied the motion for leave to intervene. From this order appellant has appealed, asserting that the court erred in denying him relief. Both appellees, plaintiff and defendant below, insist that the order should be affirmed." (Appendix, page 27)

Respondent Ortman-Miller states that the District Court on remand permitted petitioner Miller to introduce "evidence for six days in an attempt to prove the allegation of his amended petition." Brief, page 5. What Respondent Ortman-Miller fails to state is that attorney Straley Thorpe, acting for Respondent Ortman-Miller at this hearing, failed to even offer any proof at all opposing the proof introduced by Petitioner Miller. To eliminate any doubt on the subject we quote Respondent Ortman-Miller's brief in the Court of Appeals:

"In outlining its side of the argument now being settled in the state courts of Indiana, the defendant is handicapped by the fact that the attorney who represented it at the trial of this case (Straley Thorpe) did not introduce any evidence to establish its side of the basic argument between J. Carter Miller and Ortman-Miller Machine Company, Inc. The defendant simply

took the position that all of the intervenor's evidence on this question was immaterial and should not be considered by the court."

(Appellee Ortman-Miller's brief on appeal, pages 8 and 9)

(To avoid any contention that the record is incomplete on this subject, Petitioner has arranged to have copies of the brief quoted from filed in this Honorable Court).

Respondent Scott Cuthill introduced no evidence at the hearing except a printer's bill (to prove Cuthill paid his own printing costs in the first appeal). Straley Thorpe, acting on behalf of Respondent Ortman-Miller put on one witness, Clarence Harney, who testified over objection on the subject of the purported merits of Cuthill's wage claim —which wasn't in issue under the allegations of the amended petition for leave to intervene.

The evidence is undisputed that Cuthill had collaborated with Thorpe and Harney in the conspiracy to destroy and appropriate Midwest Supply Company under a promise of reward long before Thorpe and Harney conceived the idea of having Cuthill file a Wage and Hour Claim in the Federal Court as a means of getting money out of the corporate treasury without danger of being detected later.

Again, the Supreme Court of Indiana on appeal, affirmed the findings of the Newton Circuit Court to the effect that the following allegations were true and supported by ample credible evidence:

"Following the conclusion of the trial, plaintiff upon checking, learned that one of the witnesses, Clarence Harney, had a criminal record in Chicago. He was found guilty on March 15, 1948, of passing bad checks, a felony. Judge Dougherty of the Cook County Criminal Court, placed him on probation. He later came to Hammond and occupied an office with

> C. Ballard Harrison, a lawyer, and also a convicted felon. Unknown to the plaintiff and not discovered until July 21, 1952, one Scott Cuthill, the office manager of plaintiff, in his business at 704 Wentworth Avenue, Calumet City, Illinois, had been collaborating with Harney and the defendant's attorney, Straley Thorpe, throughout and prior to the trial. Cuthill privately collaborated with Harney in perpetrating the frauds upon the plaintiff described in the complaint. Being in a fiduciary position and completely in confidence with the plaintiff, Cuthill was in a position to secrete evidence from the plaintiff which he might have produced at the trial. Illustrative of his conduct is a letter discovered by the plaintiff and attached hereto as Exhibit "A". Of recent date, as plaintiff is informed and believes the fact to be, Cuthill received a large sum of money from the defendants for his assistance in collaborating to defraud plaintiff. Had the court been fully informed as to the criminal record of Harney, his collaboration with Cuthill, Thorpe and Harrison, the court would not have written into the findings the hearsay statement of Harney as written by co-conspirator Thorpe."
>
> (Appendix, pages 49 and 50)

A comparison of the allegations of the Amended Petition for Leave to Intervene as it appears in the record, at pages 18 through 25 of Intervenor-Appellant Miller's Appendix filed as the preliminary record in this Court under Rule 21(4) with the findings of the Newton Circuit Court, as affirmed by the Supreme Court, and the opinion of the Supreme Court as hereinabove quoted reveal that the allegations of the Amended Petition for Leave to Intervene were established by uncontroverted proof.

What the District Court Decided.

The District Court did not decide the issue presented by the allegations of Amended Petition for Leave to Intervene and the uncontradicted proof offered in support of these allegations as is claimed by the Respondents in their "Concise Statement of the Case". The District Court denied intervention and refused to vacate the judgment on spurious issues which were not within the pleadings and which Miller did not and could not anticipate or offer any evidence upon.

For example, the opinion of Judge Lindley in the first appeal correctly paraphrased the issues presented by the Amended Petition for Leave to Intervene as follows:

> "'Here appellant pleaded with great particularity and great detail facts tending to show;'
>
> (1) 'that there had been no adversary trial of the issue in the case;'
>
> (2) 'that this situation emanated from the collusion of the original parties;'
>
> (3) 'that appellant's interests were adversely affected and that no adequate representation of his and the corporate interests had been supplied.'
>
> (our numbers) Intervenor Miller's Appendix, page 29.
>
> These are the elements described as essential to vacating a judgment under *United States* v. *Throckmorton,* 98 U.S. 61, at page 65, 25 L. Ed. 93, cited in the opinion. Under the law of the case, the District Court was obliged to direct its attention to these aspects of the judgment of December 21, 1953." (Miller's brief, page 54)

The opinion (Appendix, page 29) held that: "plaintiff (petitioner) was entitled to be heard upon his averments". The District Court complied with the decision insofar as

permitting a hearing on the averments, but did not enter findings upon the issues presented. Rather, the District Court entered findings on new, separate, and distinct issues.

For example, the major issues which the District Court decided are as follows:

> "a determination of the major issue raised by the intervenor's petition will be made: were there any fraudulent misrepresentations made to this court? It is evident that the intervenor's right to have the judgment set aside under Rule 60(b) must lie in the determination of whether he has shown any such misrepresentations."
>
> (Intervenor Miller's Appendix, page 12)

And again:

> "as discussed previously, one of these alleged misrepresentations was that Cuthill had a valid claim for overtime."
>
> (Intervenor Miller's Appendix, page 13)

In spite of the fact that petitioner Miller did not allege that misrepresentations were made to the District Judge on December 21, 1953, when the judgment was entered on the subject of the validity of Cuthill's claim or otherwise and was neither present nor knew anything about the purported settlement conference, he lost because he presented no credible evidence on these spurious issues:

> "The intervenor's charges of fraud and collusion between the parties and counsel cannot stand up beside this evidence of the adversary attitude of the parties and their counsel from the time the complaint was filed until their appearance in court on December 21, 1953."
>
> (Intervenor Miller's Appendix, page 16)

The Court of Appeals affirmed on the theory that there was evidence to support the findings on the spurious issues:

"The district court correctly decided the true issue in this case. The court's opinion stated:

'Having in mind the facts and charges surrounding the dispute between Miller and the other parties connected with Ortman-Miller at the time Cuthill filed his complaint in this court, a determination of the major issue raised by the intervenor's petition will be made: were there any fraudulent misrepresentations made to this court? It is evident that the intervenor's right to have the judgment set aside under Rule 60(b) must lie in the determination of whether he has shown any such misrepresentation.'"

(Appendix, certiorari petition, page 9a)

And again:

"From a careful review of all facts and circumstances before the trial court it must be concluded that there was substantial evidence to support the findings of fact by the district court. The refusal to vacate the judgment and permit a defense to be made was not an abuse of discretion."

(Appendix, certiorari petition, page 10a)

Petitioner Miller raised no question on appeal about the sufficiency of the evidence to support the findings of the district court. The question raised on appeal was a question of law as to whether or not the decision was erroneous because the district court neglected or refused to enter findings within the issues established by uncontradicted evidence within the rule announced by this Court in *Alexander* v. *Machan,* (1893) 147 U.S. 72, 13 S. Ct. 211, 37 L. Ed. 84, as follows:

"If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal

to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court. The *Francis Wright*, 105 U.S. 381, 387; The *E. A. Packer*, 140, U.S. 360, 11 S. Ct. Rep. 794."

This petition for a writ of certiorari is not filed because a District Court merely misconceived the issues on whether or not a small judgment in a Wage and Hour Act case ought to be set aside which is what the District Judge concluded he was confronted with:

> "The decision which I am confronted with on this issue is not whether the Court would find for Cuthill were his claim relitigated, but whether he misrepresented to this Court the fact that he had a claim for overtime compensation, et cetera".
>
> (Intervenor-appellant Miller's Appendix, page 14)

Nor is the petition presented because a Court of Appeals erroneously reviewed the decision from the standpoint of whether there was evidence to sustain the District Court's findings. (This is the complexion which Respondents have earnestly attempted to cast into the minds of this Court.)

The petition is filed to prevent the consummation of a serious fraud on the court. As stated by Justice Roberts in his concurring opinion in *Hazel-Atlas Co.* v. *Hartford Empire Co.*, (1944) 322 U.S. 238, 64 S. Ct. 997; 88 L. Ed. 1250, at page 1004 of the Reporter:

> "No fraud is more odious than an attempt to subvert the administration of Justice."

(f)

ARGUMENT.

I.

The Court of Appeals erroneously refused to permit the filing of petitioner Miller's independent application and petition to vacate the opinion and decision of October 16, 1957.

The case of *Hazel-Atlas Co.* v. *Hartford Empire Co.*, (1944) 322 U.S. 238; 64 S. Ct. 997; 88 L. Ed. 1250 cannot be distinguished on the ground argued by Respondents. The Court of Appeals refused to entertain the application to investigate into and eradicate a fraud upon itself on the theory that its jurisdiction was confined to reviewing errors in the judgment appealed from. The decision was reversed because of its refusal to act pursuant to its inherent power to protect itself against the perpetration of a fraud upon it.

In the instant case, petitioner Miller's independent application was not denied. The Court of Appeals refused leave to file it.

Contrary to the argument made by Respondents Ortman-Miller and Cuthill, the fraud involved in the fabrication of the three page memorandum as the mechanical basis for the complaint filed on June 2, 1953 was not before the District Court. The preparation and use of the fictitious document went to the merits of the claim. As the transcript indicated, attorney Thorpe offered no defense whatsoever when the cause was submitted on December 21, 1953.

The judgment of December 21, 1953 precluded a defense on the merits by Petitioner Miller acting for and on behalf of the corporation. In speaking of actions to vacate judgments, it is stated in 49 C.J.S., para. 299, page 551:

> "Merits of cause of action or defense. * * * The Court is not to try and decide the merits of the proposed cause of action or defense, but is only to inquire whether it is meritorious, interposed in good faith, and prima facie sufficient."

It was incumbent upon the District Court to confine the hearing to the issues. The rule is stated in 49 C.J.S.—Judgments, par. 392—Issues, Proof, and Variance:

> "In order to enable the court to act on an application for relief against a judgment, it is necessary that the parties should frame distinct issues as to the matters they mean to contest, and the hearing will be restricted to the issues thus raised and presented."

As previously mentioned under the "concise statement of the case", the only question raised on appeal by Petitioner Miller was the neglect or refusal of the District Court to make findings in accordance with the uncontradicted evidence within the issues formed by the Petition for Leave to Intervene and the Answers filed by the Plaintiff and Defendant to the Petition. Findings in accordance with the issues and uncontradicted evidence would have required the granting of the amended Petition to Intervene and vacating the judgment without regard to the mechanics used in falsifying the complaint.

Having been denied the right to intervene and the Court of Appeals having affirmed the decision on October 16, 1957, there was no other method or earlier opportunity calling for the attention of the Court of Appeals the fraud perpetrated upon it by the parties to the litigation. The

plaintiff and defendant (co-appellees) had procured an opinion and decision favorable to the plaintiff Scott Cuthill on the contention that, under the evidence, he had a meritorious claim which had been settled by the parties at a conference held a week or ten days prior to the submission of the case in the District Court for decision. (This is the gist of the opinion of the Court of Appeals rendered on October 16, 1957.) The fictitious document conclusively shows just the opposite—that the complaint, letter from Burkey to Richards in November of 1953, and settlement conference were all based upon the figures copied from an insurance calendar in Harney's office.

The real question before the Court of Appeals was not, as Respondent Cuthill claims, "whether any fraud was committed on the U. S. District Court by proving such a claim before it." If that were the issue, neither your petitioner nor Respondent Ortman-Miller would be interested in the result. The question quoted from counsels' brief is merely the spurious issue which the parties to the judgment, working in collusion, created.

The real question was whether Ortman-Miller Machine Company could protect the ingenious method devised by Straley Thorpe and Clarence Harney to pay off Cuthill under the guise of a judicial decision in his favor on a Wage and Hour Claim (in view of the nature of the pending damage litigation in the State Courts of Indiana.) The protection of the judgment in Cuthill's favor is a far more important project, at this stage of the litigation, than any question involving the mere misrepresentation of an overtime claim.

II.

The merits of the claim were not at issue and were not heard; but it sufficiently appears from the record that there are complete defenses to the claim, none of which were made.

Respondent Cuthill's brief asserts that "The plaintiff's claim was supported by a running record of hours worked, which he had kept during his employment, et cetera" (Cuthill Brief, page 2). The brief of Ortman-Miller Machine Company is completely silent on the subject of the origin of the facts and figures that resulted in a judicial decision that Cuthill worked 893½ hours of overtime (not barred by limitations) and was entitled, as a matter of law, to $4,100.00 damages.

Neither of the respondents' briefs mention the salient fact that if the plaintiff and the defendant had not, through collusion, prevented a defense to the claim, Intervenor Miller would have shown the complete fabrication of the claim, the true facts and circumstances behind the "settlement conference", and the fact that Clarence Harney, the external auditor in *whose office Cuthill resided,* paid Cuthill for whatever activities he engaged in, in connection with Ortman-Miller Machine Company taxes. These and other matters of defense were suppressed by the collusive conduct of Attorney Straley Thorpe, who undertook to represent Ortman-Miller Machine Company in the proceedings which resulted in the judgment of December 21, 1953.

The transcript in cause No. 11184, Seventh Circuit Court of Appeals, has been furnished to this Honorable Court by Respondent Ortman-Miller Machine Company, according to its brief. This transcript contains all the evidence which the District Judge heard on December 21, 1953, when he

decided the case in Respondent Scott Cuthill's favor. No memorandum, fictitious or otherwise, was offered in evidence, the memorandum which Attorney Burkey used to draft the complaint—and which was the basis of the letter from Burkey to Richards, mentioned in the opinion of the Court of Appeals, and which was the basis of the representations made to the District Judge on December 21, 1953 when the judgment was rendered—is the fabricated, fictitious document drawn up from an insurance calendar day-book in Harney's office. This document has been photostated and attached to the independent application and petition of Miller to vacate the decision and opinion of the Court of Appeals, for fraud.

A close scrutiny of the photostatic copy of the list of hours attached to petitioner Miller's independent application and petition shows that it was all written at one time. It also shows that claim is made for long hours of overtime on Saturdays, Sundays and holidays running over many months. Respondent Cuthill was, of course, at Harney's office during this time, but not because he was working there—as stated above, during this period he made Harney's office his home.

No demand was made by Cuthill for such overtime pay for more than a year after the supposed services were claimed to have been rendered, and then at the time his testimony in the Indiana State Court litigation brought by petitioner Miller against Straley Thorpe, Ortman-Miller and others became important.

Petitioner, if given the right to defend on behalf of Ortman-Miller, defendant, will introduce evidence to show that Cuthill does not qualify under the Wage-Hour Act since he was employed in a managerial capacity.

Petitioner will also, if given the right to defend, introduce evidence to show that the supposed "settlement conference," far from showing an "adversary attitude," showed the contrary in that the agreement undertook to pay Cuthill more than he claimed for overtime services.

Conclusion.

Even in their conclusion, respondents misrepresent the record. Actually the record is as follows:

(1) The petitioner was not permitted to intervene.

(2) There has been no hearing on the merits of the claim.

(3) The undisputed evidence of fraud introduced by petitioner was brushed aside as not standing up against a completely false issue, namely, the "adversary attitude" of the respondents in a so-called "settlement conference," which settled nothing, but gave Cuthill all he claimed. The District Court based this decision primarily on the evidence of Joseph Sullivan, one of Cuthill's attorneys, who was called as the court's witness.

(4) Every word and act of the respondents, who should be adversaries, show they are in collusion to prevent petitioner Miller from obtaining a hearing on the merits of Cuthill's claim.

(5) It is clear that the respondents practiced a fraud on the courts below, and have thereby denied your petitioner the right to intervene, to become a party, and to present a defense on the merits to the Cuthill claim.

It thus appears that this case is fraught with collusion and fraud calling for the exercise of this court's supervisory powers to protect the integrity of the Federal Judiciary.

Respectfully submitted,

/s/ Owen W. Crumpacker,
/s/ Benjamin Wham,
Counsel for Petitioner.